(9)

No. 97-1536

In The

Supreme Court of the United States

October Term, 1997

STATE OF ARIZONA ex rel. Arizona Department of Revenue,

Petitioner,

vs.

BLAZE CONSTRUCTION COMPANY, INC.,

Respondent.

On Writ of Certiorari to the Arizona Court of Appeals, Division One

BRIEF FOR RESPONDENT

BRUCE C. SMITH
LAT J. CELMINS
Counsel of Record
MARGRAVE CELMINS, P.C.
Attorneys for Respondent
7201 East Camelback Road
Suite 330
Scottsdale, Arizona 85251
(602) 994-2000

148047

(800) 274-3321 • (800) 359-6859

COUNSELPRESS

71 pp

QUESTIONS PRESENTED

I. Is Arizona's taxing scheme invalid as applied to road construction contracts on Indian reservations because the tax impermissibly interferes with an Indian tribe's right to self-government to make decisions regarding its infrastructure on the reservation?

II. Is the imposition of a state transaction privilege (sales) tax on road construction activity for the benefit of Indian tribes and located entirely on Indian reservations pre-empted by federal law when the road construction is financed and regulated by the Bureau of Indian Affairs, the selection of the road construction projects is made by Indian tribes, and the State provides no services or regulatory activities in connection with the activities being taxed?

LIST OF PARTIES AND CORPORATIONS

Petitioner is the State of Arizona. The Arizona Department of Revenue was the governmental agency whose name appeared on all pleadings and briefs in the proceedings below. Respondent Blaze Construction Company, Inc. is a Blackfeet corporation and has no parent companies and no nonwholly owned subsidiaries.

TABLE OF CONTENTS

Table of Contents

Table of Cited Authorities

TABLE OF CITED AUTHORITIES

Cases Cited:

Table of Cited Authorities

Table of Cited Authorities

Table of Cited Authorities

Table of Cited Authorities

Statutes Cited:

United States Constitution Cited:

Table of Cited Authorities

Table of Cited Authorities

Table of Cited Authorities

Table of Cited Authorities

Table of Cited Authorities

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Article I, § 8, cl. 3 to the United States Constitution provides that "Congress shall have Power . . . To regulate Commerce with foreign nations, and among the several States; and with Indian Tribes."

The Appendix to the Petition contains selected portions of Federal statutes for highway construction, 23 U.S.C. § 204 (Pet. App. 34), the Bureau of Indian Affairs (BIA) regulations regarding road construction, 25 C.F.R. §§ 170.1-170.9 (Pet. App. 37-39), and the pre-1996 regulations under the Self-Determination and Education Assistance Act, 25 C.F.R. §§ 271.1-271.5. Blaze Construction includes as an Appendix to this brief the significant statutes and regulations cited herein. Supreme Court Rule 24.1. The statutes include portions of the Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450a, 450h; relevant portions of the "Findings" and "Declaration of Policy" for the Tribal Self-Governance Act of 1994, 108 Stat. 4250, 4270-71 (1994), and relevant portions of § 1115 of the Transportation Equity Act for the 21st Century, 112 Stat. 107 (1998). Blaze also includes in its appendix BIA regulations regarding rights-of-way for road construction projects on reservations, 25 C.F.R. §§ 169.3, 170.5; and the recent regulations promulgated under the Self-Determination Act, 25 C.F.R. §§ 900.3 (excerpts), 900.115 (excerpts), 900.119, 900.124, 900.240, 900.241, 900.244, 900.246, and 900.256.

STATEMENT OF THE CASE

Blaze Construction Company, Inc. is a 100% Indian-owned company that is incorporated under the laws of the Blackfeet Tribe. J.A. 12. Between 1986 and 1990, Blaze Construction entered into nineteen contracts with the BIA to construct rural roads located on remote sections of the Navajo, Hopi, Fort Apache, Colorado River, Papago (Tohono O'odham) and San Carlos Apache Indian reservations in Arizona. *See generally* J.A. 13-21 (description of

various projects).[1] Blaze Construction received $26,038,638.66 in revenue for the construction projects. The Arizona Department of Revenue assessed $1,200,581.54 in transaction privilege taxes on the gross receipts of Blaze Construction for the nineteen construction projects. J.A. 11-12. This case presents the issue of whether state transaction privilege, or similar kinds of taxes, are pre-empted by federal law because they conflict with federal regulations and interfere with tribal self-government.

A. Government-to-Government Relations with Indian Tribes

The Federal Government interacts with Indian tribes as sovereign entities. The United States Congress specifically reaffirmed and validated the sovereignty of Indian tribes this year when it passed the Transportation Equity Act for the 21st Century. *See* Pub. L. 105-178, § 1115(b)(4), 112 Stat. 107, 155 (1998) (amending 23 U.S.C. § 202 by adding subsection (2)(C)(I), which directs Secretary of Interior in promulgating new regulations implementing transportation bill to apply procedures "in a manner that reflects the unique government-to-government relationship between Indian tribes and the United States"); *see also* Pub. L. 103-413 § 202(1), 108 Stat. 4250, 4270-71 (1994) (Congressional finding when enacting Tribal Self-Governance Act of 1994 that "the tribal right of self-governance flows from the inherent sovereignty of Indian tribes and nations"); H.R. Rep. No. 93-1600, 93rd Cong., 2d Sess., (1974), *reprinted in* 1974 U.S.C.C.A.N.

1. Although the record in this case is silent on the issue, Blaze did not include state taxes in its bids for road construction projects that it completed in New Mexico. *See* Petition for Writ of Certiorari at 7, *Blaze Constr. Co. v. Taxation and Revenue Dept.* (No. 94-1233), *cert. denied*, 514 U.S. 1016 (1995). This Court can take judicial notice of the record in other cases that have been before it. *See Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 157 (1969) (judicial notice of record of conditions of civil rights march in *Walker v. City of Birmingham*, 388 U.S. 307 (1967)); *Wells v. United States*, 318 U.S. 257, 260 (1943) (judicial notice of prior habeas corpus proceedings) (per curiam); *Boag v. MacDougall*, 454 U.S. 364, 367 (1982) (Rehnquist, J., dissenting) (taking judicial notice of filings in United States District Court in Arizona).

7775, 7780-81 (recognizing tribal sovereignty and power of self-government, and that federal law limits tribal powers, but is not the direct source of tribal power); 25 C.F.R. § 900.3 (statement of Congressional policy in Self-Determination Act regulations).

The Executive Branch also interacts with Indian tribes as sovereign governments. On April 29, 1994, President Clinton issued a memorandum entitled "Government-to-Government Relations with Native American Tribal Governments." 59 Fed. Reg. 22,951 (1994). This memorandum clarifies that federal agencies will "ensure that the Federal Government operates within a government-to-government relationship with federally recognized Native American tribes." *Ibid.*; *see also* Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (1998). The head of each executive department and agency must consult with tribes, to the extent permitted by law, prior to taking actions that affect a tribe and must

> assess the impact of . . . Government plans, projects, programs, and activities on tribal trust resources and assure that tribal government rights and concerns are considered during the development of such plans, programs, and activities.

59 Fed. Reg. 22,951; *see also* Exec. Order No. 12,875, 58 Fed. Reg. 58,093 (1993) (recognizing the strain the budget places on tribal governments and requiring tribal input on proposed regulations); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993) (executive agencies required to obtain views of tribal governments before imposing regulatory requirements on them); Proclamation No. 5049, 48 Fed. Reg. 16,227 (1983) (recognizing government-to-government relationship); 25 C.F.R. § 900.3(b)(7) (policy of Secretary to work with tribes on government-to-government basis). These statutes and executive pronouncements are examples of the United States' continuing trust obligation to Indians.

B. Statutory and Regulatory Guidelines for Road Construction Projects on Reservations

The United States carries out its trust obligations in a variety of ways, including the construction of roads on Indian reservations. 23 U.S.C. § 204; 137 Cong. Rec. E3566 (daily ed. Oct. 28, 1991) (statement of Rep. Miller supporting funding for Indian reservation road under Intermodal Surface Transportation Efficiency Act of 1992 and remarking that the Federal Government has a "fiduciary responsibility" to see that the Indians have a safe and modern infrastructure); 25 C.F.R. § 900.3(a)(2). Until 1983, Congress appropriated money for the construction of Indian roads in the budget for the BIA. In 1983, however, Congress merely shifted the reservation roads program into the Federal Lands Highway Program, which is managed by the Secretary of Transportation. 23 U.S.C. § 204. After money is allocated to the Department of Transportation, it is transferred to the Secretary of the Interior. *Ibid.* The BIA Area Office monitors and controls funds during each fiscal year. Federal Highway Administration, Department of Transportation & Bureau of Indian Affairs, Department of Interior, *Indian Reservation Roads Programs Stewardship Plan* 38 (July 1996) (hereinafter "*Stewardship Plan*"). The BIA Division of Transportation allocates contract authority and obligations according to the needs formula. *Ibid.*

Each BIA office has a limited budget for road construction projects. At the time that Blaze was building the roads in this case, the BIA had an annual budget of $20 million.[2] J.A. 32. This money

2. Starting in fiscal year 2000, money for road construction projects on reservations will be allocated among Indian tribes according to a formula established by the Department of Interior. Pub. L. 105-178, § 1115(b)(4), 112 Stat. at 155 (amending 23 U.S.C. § 202 and adding (2)(A)). Under the funding formula, the Secretary must take into consideration the transportation needs of Indian tribes. *Ibid.* (amending 23 U.S.C. § 202 and adding (2)(C)(I)). Congress also created a new rulemaking committee, which is required to consider the challenges faced by Indian tribes, the cost of road construction in each area, the "geographic isolation on reservations, and difficulty in maintaining all-weather access to employment, commerce, health, safety, and educational resources." *Ibid.* (amending 23 U.S.C. § 202 and adding (2)(C)(ii)).

was not sufficient to meet all of the needs for the design and construction of roads on the reservation. *Ibid.* Eddie Ward said that the roads on the Navajo Reservation, for example, "are in bad shape" and the government does not have enough money to maintain them or upgrade them. J.A. 35. In 1996 the BIA received $26 million per year for road maintenance. *Stewardship Plan* 5. The BIA estimated, however, that it needed $90 million per year to adequately maintain reservation roads. *Ibid.*

Mr. Ward's opinions regarding the condition of roads on the reservations are shared by members of Congress. On June 11, 1991, Senator Pete V. Domenici of New Mexico, in proposing an amendment to the Federal Highway Act to increase funding for the Indian road program said:

> [T]he 20,000 miles of Indian roads in the United States are without a doubt the worst 20,000 miles under any unit of Government's jurisdiction in the United States.
>
> The surveys would indicate that the Indian people are traveling on non-roads for the most part. Very few of them are up to any kind of standard that we would travel on. Yet the Indian people pay gas tax, they have trucks and cars, and all of the other kinds of things that we have. And we seek for them a better life.
>
> In some cases, we say let us have economic development and some prosperity on Indian land for the Indian people. We all admit without roads there would not be any prosperity for any of us, and how can we expect them to have economic prosperity and development when they have hardly any roads to travel on?

* * *

> [T]he needs survey that outlines the inadequacy of this system, rating the conditions of these roads, found that only 11 percent of the paved roads and none of the unpaved roads were in good condition. Conversely, 53 percent of the paved roads and a staggering 90 percent of the unpaved roads were rated as poor.

137 Cong. Rec. S7786-87 (daily ed. June 13, 1991); *see also* 137 Cong. Rec. S7787 (daily ed. June 13, 1991) (Statement of Sen. Conrad that roads on reservations are in "abysmal condition"); 137 Cong. Rec. E3566 (daily ed. Oct. 28, 1991) (Statement of Rep. Miller) ("As chairman of the Committee on Interior and Insular Affairs, I have received countless stories of school buses unable to drive to schools because of substandard roads, and of emergency vehicles unable to reach patients in need of medical treatment because of poor road conditions. These are everyday events on Indian reservations. . . .").

If states are allowed to impose a 5% tax on road construction projects, it means that the Indian tribes will have fewer roads. J.A. 33. Based on a $20 million budget, the Indian tribes receive $1 million less in road construction if the 5% tax is imposed on contractors. J.A. 33. The State provided no facts below, and provides none to this Court, that contradict Mr. Ward's testimony.[3]

3. Arizona contends that Mr. Ward was not competent to provide this testimony. Brief at 5 n.2. Arizona's argument and citation to the record is misplaced. First, at the time of these contracts and when Mr. Ward testified, federal regulations required him to know about and inform Indian tribes about the realities of federal funding. 25 C.F.R. § 271.4(e) (1996). Second, the State waived any arguments to Mr. Ward's testimony by not objecting to it during the hearing itself, in any pleadings filed with the tax court, or in its brief to the Arizona Court of Appeals. J.A. 33 (no objection to testimony during hearing); *see Peretz v. United States*, 501 U.S. 923, 936 (1991) (waiver of objection to magistrate presiding over criminal trial); *Mohave Elec. Cooperative, Inc. v. Byers*, 189 Ariz. 292, 301, 942 P.2d 451, 460 (Ct. App. 1997) (failure to object in summary judgment proceedings). Third, Mr. Ward did not testify that he lacked (Cont'd)

Indian tribes are not mere recipients of federal money. 25 U.S.C. § 450a(b); 25 C.F.R. § 900.115(b) (Self-Determination contracts not typical procurement contract). Each tribal government works with the Secretary of the Interior regarding all Indian reservation road projects proposed for funding. 23 U.S.C. § 204(e); *see also* 25 U.S.C. § 450a(b) (Indian tribes are afforded "meaningful participation . . . in the planning, conduct and administration of [federal] programs and services"); 25 C.F.R. § 900.119 (before spending any funds for a planning, design, construction or renovation project, the Secretary shall consult with any Indian tribe significantly affected and follow tribal preferences to greatest extent possible); *Stewardship Plan* 19, 43 (discussing tribal involvement in planning of projects and all of the activities constituting "transportation planning").

> Projects shall be selected by the Indian tribal government from the transportation improvement program and shall be subject to the approval of the Secretary of the Interior and the Secretary [of Transportation].

(Cont'd)
personal knowledge about the effects of taxation on tribal roads. Rather, he testified that he did not know whether the Phoenix BIA office provided funding for the Navajo reservation:

> PI: Do you know if the Navajos have ever gotten some money from the Phoenix area?
>
> EW: I heard that we had, but I don't get involved in that aspect of it either.
>
> PI: So you just aren't as involved in the financing —
>
> EW: — no —
>
> PI: — part of it —
>
> EW: — I'm not involved in the financing at all.

J.A. 54.

23 U.S.C. § 204(j); *see also* 25 C.F.R. § 170.4a; *Stewardship Plan* 4; J.A. 35.

The BIA does not have absolute authority to set the priorities for road construction projects. 25 C.F.R. §§ 170.4a; 900.119. The BIA can only "recommend" to an Indian tribe the projects having the greatest need. 25 C.F.R. § 170.4a. Each Indian tribe "establish[es] annual priorities for road construction projects. Subject to the approval of the Commissioner, the annual selection of road projects for construction shall be performed by tribes." *Ibid.*; *see also Stewardship Plan* 4. The BIA works with the Indian tribes to establish long-range transportation plans for Indian reservations. *Stewardship Plan* 19. To promote coordination and comprehensive planning for road construction projects, the BIA holds public hearings. *Ibid.* § 170.10. One of the main objectives of a public meeting is to "[i]nsure that road locations and designs are consistent with the reservations' objectives. . . ." *Ibid.* The BIA ultimately approves the location, type and design of road projects on the Federal-Aid Indian Road System. 25 C.F.R. § 170.4.

Eddie Ward from the BIA office in Albuquerque described how the process works at the local level:

> [T]he tribe has a roads committee which sets the priorities. A lot of it has to do with politics, as I mentioned there's — they set up the priorities on a need out there for those roads. Both — they go to the area's chapter houses, school bus routes, probably some schools don't have a paved road going to the schools, so they may make that decision to put it on a priority. And they furnish that priority to the Branch of Roads, and then they make the decision as to the money — whether it's just going to be a grade and drain project from the outset or a grade and drain and paved, but that decision is made in the Branch of Roads.

J.A. 35.

Indian tribes have a first right of refusal to enter into Self-Determination contracts for road construction on reservations. *Stewardship Plan* 29. If an Indian tribe decides to enter into a construction contract itself, the Department of Interior authorizes (or grants) the money to the tribe. 25 U.S.C. § 450h; J.A. 45-46 (testimony of Eddie Ward). A Self-Determination Act contract "is a government-to-government agreement" and is not a typical procurement project. 25 C.F.R. § 900.115(a)-(b). Under the new regulations for Self-Determination Act contracts, the Secretary of the Interior either provides the money as a grant to the tribe, 25 C.F.R. § 900.124, or the Secretary approves a schedule for payments based on progress, need and other considerations.[4] *Ibid.* § 900.132(a). The BIA is forbidden from coercing Indian tribes into making certain decisions regarding road construction projects. It is the express policy of the Federal Government for Self-Determination Act decisions "to permit each Indian tribe to choose the extent of such participation of such tribe in self-governance." Pub. L. 103-413 § 203(2), 108 Stat. 4250, 4271 (1998) (Declaration of Policy of the Tribal Self-Governance Act of 1994); *see also* 25 C.F.R. § 900.3(b)(5) ("tribal decisions to contract or not to contract are equal expressions of self-determination"); Proclamation No. 5049, 48 Fed. Reg. 16,227 (1983) (federal government to eliminate "government intervention" that has "stifled local decisionmaking").

If an Indian tribe decides to accept a grant and contract for road construction projects itself, the tribe must follow Federal

4. The Self-Determination Act regulations also contain detailed requirements as to what an Indian tribe must do if wants to enter into a construction contract, 25 C.F.R. §§ 900.122, 900.125-.126; methods for resolving disputes, § 900.123; what must be contained in a tribal budget, § 900.127; funding by the Secretary, § 900.128; methods for determining a fair price, § 900.129; and the role of the Indian tribe and the Secretary during all phases of construction. *Ibid.* §§ 900.130-.131. It should also be pointed out that construction projects are treated differently than other contracts that an Indian tribe can enter into under the Self-Determination Act regulations. *See generally ibid.* §§ 900.7-900.33 (regulations for contract proposals, and review and approval of contract proposals).

Highway Administration standards for roads. J.A. 46-47. The only difference between the two contracts is "whose name is on the contract." J.A. 47. In this case, the State of Arizona concedes that if there was a construction contract between an Indian tribe and Blaze Construction, it was not entitled to tax Blaze. Exhibit D to Appellant's Opening Brief at 14-15 (discussing removal of assessments for contracts between Blaze and tribes); R. 7, Exh. B, at 1 (decision of Arizona Department of Revenue hearing officer noting that Arizona "agrees that receipts from . . . projects ["undertaken for tribes or tribal entities"] are not subject to the Arizona Privilege Tax"); Arizona Transaction Privilege Tax Ruling 95-11 at 3, Ariz. St. Tax Rep. (CCH) ¶ 300-192 (gross proceeds from construction projects on Indian reservations not subject imposition of privilege tax if "[t]he activity is performed for the tribe or a tribal entity").

The Self-Determination Act regulations also make provisions for two scenarios in which the Secretary has to resume responsibility for the contract. An Indian tribe (or tribal organization) may retrocede the contract, i.e., return it to the Secretary, for any reason before the expiration of the term of the contract. 25 C.F.R. §§ 900.240-.241. In some circumstances, it may be necessary for the Secretary to reassume or rescind the construction contract, either in whole or in part. *Ibid.* §§ 900.246-.247. In the event of a retrocession or reassumption of the contract, the Secretary is obligated to provide at least the same level of funding. *Ibid.* §§ 900.244 (retrocession), 900.256 (reassumption).[5]

In many road construction projects, Indian tribes provide value to a project, even if the BIA enters into contracts with contractors such as Blaze. It may be necessary for an Indian tribe to grant of a

5. While the United States has discussed the new regulations in its brief, Brief for United States as Amicus Curiae in Support of Petitioner 5, 20, it does not take a position on whether a state has the right to tax a construction project if the contract was initially awarded to an Indian tribe, but later retroceded or reassumed to the Secretary. Blaze Construction discusses the implications of the new regulations *infra* at 32-33.

right-of-way to the BIA for the construction of a road. J.A. at 36; *see also* 25 C.F.R. §§ 169.3, 170.5. When the tribe grants a right-of-way to the BIA, it is providing something of value, even though the BIA does not have to compensate the tribe for the right-of-way. J.A. 36. In some cases, Indian tribes contribute other resources for projects such as water and base materials. *See* Petition for Writ of Certiorari at 7, *Blaze Constr. Co. v. Taxation and Revenue Dept.* (No. 94-1233) (New Mexico tribes contributed water and base materials), *cert. denied*, 514 U.S. 1016 (1995).

C. Nature of the Construction Projects at Issue

The roads built by Blaze Construction serve extremely remote locations located on Indian reservations, and provide access to Indian schools, homes and local government centers. *See generally* J.A. 13-21. The remote nature of many of these roads, and their importance to the Indians living on the reservations, is shown by a few descriptive examples of the projects.

The "Blue Gap Road Project" involved paving seven miles of road on BIA/Navajo Route 29, as well as pavement of a Chapter House parking lot. J.A. 14-15 (No. 12). The "Blue Gap" project improved access to the Chapter House and to scattered Indian housing in the area. J.A. 15. The road serves as a school bus route for the children. *Ibid.* In the "Blue Gap" area, there are no buildings other than the Chapter House and scattered houses, and it "is located at its closest at least 105 miles by road from the Reservation border. . . ." *Ibid.* Other road construction projects on the Navajo Reservation were forty-four, sixty, and eighty miles respectively from the reservation border, and they improved access to homes Chapter Houses and schools. J.A. 15-16 (Nos. 13-14, 16). The Red Valley Road project was in such a remote region of the Navajo Reservation that to get to the closest point in Arizona not within the Reservation, one had to travel across unimproved roads[6] via

6. For example, Indian 43 is a highway on the Hopi Reservation. A reporter from the Arizona Republic newspaper described Indian 43 from the Hopi Cultural Center on the Second Mesa to the Navajo Reservation as 20 miles of "rutted, (Cont'd)

U.S. Route 666 to Gallup, New Mexico and then back to Sanders, Arizona. J.A. 17 (No. 18).

Blaze's construction projects on the other reservations were similar in character to those on the Navajo Reservation. Blaze provided grading, drainage and pavement for BIA/Hopi Routes 17, 503, and 508, and pavement of the parking lot at the Hopi Tribal Government Center. J.A. 18 (No. 20). This project improved access to housing on the Hopi Reservation[7] and to the Tribal Government Center. *Ibid.* Blaze constructed roads on the Parker Colorado River Roads Project to allow farmers to move equipment between irrigated fields. J.A. 18-19 (No. 22). Blaze built roads on the Papago and San Carlos Indian Reservations to provide better access to scattered Indian housing. J.A. 19-20 (Nos. 24-25, 27). Eddie Ward, the BIA official in Albuquerque who administered these contracts, testified that the areas of the reservations in which Blaze built roads are used almost exclusively by Native Americans residing on their respective reservations. J.A. 41.

D. Arizona's "Involvement" in the Road Projects

Blaze Construction does not own or maintain any offices in Arizona, and holds no contractor's license from Arizona. J.A. 13 (Nos. 3-4). The BIA does not require Blaze to be licensed by Arizona as a prerequisite to being awarded a road construction project. J.A. 13 (No. 4). Blaze Construction only used Federal and State roads to transport equipment from reservation to reservation. J.A. 26-27. Blaze paid fees relating to its use of the Arizona highways during the period of the Assessment, including

---

(Cont'd)
corrugated" road. Richard Nilsen, *Geologic Hub, Cultural Nexus: On Black Mesa, Life on the Rez Comes into Focus*, Ariz. Rep. June 28, 1998, at T6. The road from Second Mesa to Black Mesa is about seventy-five miles long, but 37 of those miles are "dusty gravel." *Ibid.*

7. "The Hopi live in concentrated villages and the out-country is nearly uninhabited." Richard Nilsen, *Geologic Hub, Cultural Nexus: On Black Mesa, Life on the Rez Comes into Focus*, Ariz. Rep. June 28, 1998, at T6.

the purchase and maintenance of its Arizona motor vehicle license. J.A. 21 (No. 30). Blaze was present in Arizona solely because of its construction activities on Indian reservations.

Arizona admits that it did not provide "direct services to the specific road projects that Blaze performed." Brief for Petitioner 5. More specifically, the State stipulated that "[o]n the projects under consideration, Blaze was not provided any specific services by Arizona, except Blaze's use of State roads to transport equipment from reservation to reservation." J.A. 21 (No. 29).[8] The State of Arizona takes almost no responsibility for reservation roads after the reservation boundaries. J.A. 38.[9] Arizona does maintain some main, arterial roads that pass through Indian reservations, but these roads are not at issue in this case. J.A. 39. Eddie Wood testified that in the twenty-five years he has been visiting the reservations in Arizona, the State has not built any new roads on a reservation. *Ibid.* In fact, Arizona stipulated that it provided no maintenance

---

8. This stipulated fact controls this lawsuit, not Arizona's belated arguments that it provided a worker's compensation scheme in the event of an industrial accident. Brief at 7. Arizona does not voluntarily provide a worker's compensation scheme. Rather, Congress imposed the state worker's compensation scheme on contractors. 40 U.S.C. § 290. Indeed, the State worker's compensation scheme is an insurance-based service for which businesses pay premiums. There is no evidence in the record that Blaze did not acquire and pay worker's compensation insurance.

9. The printed copy of the Joint Appendix contains a clerical error. The Joint Appendix omitted a question and incorrectly attributes the testimony of Eddie Ward to "DP," who is Attorney Daniel Press. The Joint Appendix omitted the following question:

> DP: To your knowledge, does — does the State provide any services in the way of roads or houses to the relocatees?

App. D to Appellant's Opening Brief, at 49. Because of the clerical error, the first three words of Mr. Ward's answer are incorrectly quoted in the joint appendix. In the actual transcript, Mr. Ward's answer starts as follows: "To my knowledge. . . ." *Ibid.* However, the remaining portions of Mr. Ward's answer in the joint appendix are accurate.

services related to any road at issue. J.A. 21 (No. 33); *see also* J.A. 40; App. B-C to Appellant's Opening Brief (in response to subpoena for maintenance records, the Arizona Department of Transportation said that the roads were "not State highways and are not maintained or serviced by the State of Arizona"); 25 C.F.R. § 170.6 (tribal roads maintained by Tribe or Commission of Indian Affairs). Thus, in this case, Arizona played no role in the planning, permitting or development of the road projects. J.A. 21 (No. 31). The State played no role in the formation of the contracts between Blaze and the BIA. *Ibid.* Arizona provided no planning, engineering, construction, inspection or employment services related to the projects. J.A. 21 (No. 32). Tribal employment groups, not the State of Arizona, provided employment services to Blaze.[10]

E. State Services not Related to Construction Activity

At the tax court level, Arizona relied on educational funds and Blaze's use of state highways to support its purported right to tax Blaze. The State referenced money it spent on education. R. 7 at 4-6 (Statements of Fact 13-21). Under the Johnson-O'Malley Act, 25 U.S.C. §§ 452-57, the Secretary of the Interior enters into contracts with states to educate Indian children. Federal law allows state schools to apply for grants to provide funding for the education of Indians. 20 U.S.C. § 7814(c)(2)(B). The State's own study reported that in fiscal year 1993 Arizona received $84,261,241 in federal money for educating Indian children. *See* Arizona Legislative Council ("ALC") Study at 33 (Exhibit B to State's Answering Brief); *see generally* 20 U.S.C. §§ 7701-10 (describing methodology for calculating Federal Impact Aid, payment of aid to local schools and federal requirement that local school boards

10. If Blaze had a legal dispute with a reservation Indian regarding employment issues, it would have to sue in tribal court. *See generally Montana v. United States*, 450 U.S. 565-66 (1980) (tribe can exercise civil authority over non-members when a consensual relationship with a tribal member) . If the employee had a dispute with Blaze regarding his or her wages, the local federal court, and not state court, would be the forum for such a dispute. 40 U.S.C. § 470b(a).

adopt policies to ensure adequate consultation of Indian parents and involvement of Indian children in school activities). In it brief, Arizona now refers to the funds it spent in the Chinle District. Brief of Petitioner 5. The State failed to inform the Court about the money that this district received in Federal aid. *See, e.g., Arizona Dept. of Revenue v. M. Greenberg Constr.*, 182 Ariz. 397, 399, 897 P.2d 699, 701 (Ct. App. 1995) (in 1987-88, the Chinle District received 48.4% of its money from Federal Impact Aid).

In the courts below, the State also relied on the fact that some state highways pass through Indian Country.[11] R. 7 at 3-4. A state highway exists on an Indian reservation only because an Indian tribe granted a right of way to the federal government, which in turn, granted a right of way to the State. J.A. 36; 25 U.S.C. §§ 323-38; 25 C.F.R. §§ 169.3(a) (grant of right of way to BIA), 170.5(b) (BIA grant of right of way to states). Arizona has no inherent, sovereign right to build or maintain state highways on Indian reservations because it was admitted into the Union under the condition that it would not make any claim over property within the boundary of an Indian reservation. Act of June 20, 1910, 36 Stat. 557, 569; Ariz. Const., art. XX, ¶ 4 (constitutional provision incorporating Congressional limitation).

If Blaze needed to call the police, it relied on the tribal police. J.A. 26 (testimony of Paul Wood). Arizona does not present evidence to rebut the testimony of Mr. Wood.[12] The record does

11. In response to statements 13-20, Blaze asked the trial court for additional time to develop discovery on the source of the educational funds provided to Arizona, the amount of money the State received from the Federal Government, and the opportunity to depose the affiants. App. A to Appellant's Opening Brief at 1-2.

12. Arizona also mentions in its statement of the case the subject of criminal jurisdiction over non-Indians. Arizona's criminal jurisdiction in this case would be very negligible. First, the people who used the roads are almost exclusively Indians who reside on the reservation. J.A. 41. Second, 85% of the people who worked on the project were Indians. J.A. 22 (No. 34). Consequently, federal or tribal courts are most likely to have jurisdiction over any crimes and lesser

(Cont'd)

not contain any evidence that Arizona provided law enforcement officers for police protection or to assist in traffic control during the construction of the roads. J.A. 21 (No. 33). In fact, Arizona has already admitted that it "provides no . . . regular police services related to any road at issue." J.A. 21 (No. 33). There are no facts in the record showing the expenditure of state or local funds for law enforcement services on strictly tribal roads such as the ones at issue. Moreover, there is no evidence of an agreement between an Indian tribe and a state or county government to provide law enforcement services on the roads built by Blaze. *See Gila River Indian Community v. Waddell*, 91 F.3d 1232, 1235 (CA9 1996) ("Police protection at the entertainment events is provided through the non-Indian lessees by state and county police officers specifically invited to work in cooperation with the BIA Law Enforcement Services.").

Arizona refers to social services and child support enforcement justify its involvement on Indian reservations. Brief for Petitioner 6 & nn. 5-6. This is another instance of a factual claim that Arizona did not make to the Arizona Board of Tax Appeals, the Arizona Tax Court, the court of appeals or the Arizona Supreme Court. There is no evidence that State social services or child support enforcement matters involved Blaze or any of its employees on these construction projects. The Federal Government is initially responsible for providing long-term care or social services to Indians. Arizona provides these services because it has a contract

(Cont'd)

included offenses. *See* 18 U.S.C. § 661 (federal jurisdiction for theft of personal property over $1,000 and written instruments); 18 U.S.C. § 1152 (tribal jurisdiction over crimes committed by members of the tribe); 18 U.S.C. § 1153(a) (federal jurisdiction for murder, manslaughter, kidnaping, maiming, all types of assault, arson, burglary and robbery); *United States v. Walkingeagle*, 974 F.2d 551 (CA 4 1992) (federal jurisdiction over lesser included offenses), *cert. denied*, 507 U.S. 1019 (1993). Finally, this is not a factual assertion that Arizona raised below. If it had, Blaze would have been able to develop facts showing the extent, if any, of State or county prosecutions of crimes on Indian reservations. Blaze believes that such discovery would have shown negligible State interest in crimes that take place on reservations.

with the United States. 25 U.S.C. § 452 (authorizing Secretary of Interior to enter into contracts to provide medical attention and social services to Indians). There are several social services that either Arizona provides to its citizens, but does not provide to Indians. ALC Study at 24 (listing nine Department of Economic Security programs for which there is either no cost to the State or no services provided to Indians). For three other programs, the State only pays for administrative costs for overseeing federal programs. *Ibid.*

F. Proceedings Below

The Arizona Board of Tax Appeals ruled that the State "failed to identify any valid interest it has in Appellant's construction activities." J.A. 9. The Board of Tax Appeals issued a unanimous decision on July 18, 1994 and held that the "competing federal, state and tribal interest at stake in this case compel preemption of Arizona's transaction privilege tax." *Ibid.* The State of Arizona appealed the decision of the tax board by filing a complaint with the Tax Court, which is a subdivision of the Maricopa County Superior Court. Rule 1, Rules of Practice for the Arizona Tax Court. The tax court ruled on cross-motions for summary judgment, held that *Department of Revenue v. Hane Construction Co.*, 115 Ariz. 243, 564 P.2d 932 (Ariz. Ct. App. 1977), was dispositive and overruled the decision by the Board of Tax Appeals. Pet. App. 29.

Blaze Construction appealed the judgment to the Arizona Court of Appeals. The appellate court overruled *Hane Construction* because its was not premised on the implied pre-emption analysis mandated by this Court. Pet. App. 11, 25-26. Rather than blind application of *United States v. New Mexico*, 455 U.S. 720 (1982), the Arizona Court of Appeals concluded that pre-emption analysis was appropriate because the decision of this Court in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), is not limited to cases in which there is a contract with an Indian tribe. Pet. App. 7-9. The court of appeals concluded that the various federal statutes governing respondent's construction projects constituted a comprehensive federal

regulatory scheme. Pet. App. 15-16, 24. The court also held that petitioner failed to establish any regulatory interest in the road construction projects and cited the reasoning of this Court in *White Mountain* and *Ramah Navajo School Bd. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982). *See generally* Pet. App.17-18. The appellate court further noted that in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), this Court distinguished its conclusions in *White Mountain Apache Tribe* and *Ramah* because the record before it contained evidence of state regulation of oil wells. Pet. App. 17-18. The Arizona Court of Appeals concluded that Arizona's transaction privilege tax was pre-empted by federal law. The Arizona Supreme Court denied Arizona's petition for review. Pet. App. 27.

SUMMARY OF ARGUMENT

This is a case of first impression for road construction contracts on Indian reservations. The Court must decide if a construction contract between the BIA and a contractor is governed by *United States v. New Mexico*, 455 U.S. 720 (1982), or if state taxation of the contractor is prohibited because it infringes on the right to tribal self-governance, and is pre-empted by Federal law. Previously, the Court has discussed the tribal decisions, in general, and whether the Indian Self-Determination Act pre-empted the application of state taxes. Those cases did not involve decisions under the Self-Determination Act itself. The Court must now decide whether tribal decisions under Federal self-determination statutes and regulations pre-empt the application of state law.

United States v. New Mexico involved a clash between Federal and state authority. The analytical principles that govern disputes purely between the Federal and state governments do not apply to cases in which a state tax infringes on the way in which Indian tribes decide public policy for their members. When there are disputes between states, the Federal Government and tribal government, the Court should apply the Indian pre-emption analysis, just as it employs a multi-factored pre-emption test to determine if state taxes infringe on foreign commerce.

In the instant case, Arizona's tax infringes on the tribal right of self-government and it is pre-empted by federal law. The tax infringes on tribal self-government because tribes always have retained the authority to make their own laws (policy decisions) and be governed by them. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980); *Williams v. Lee*, 358 U.S. 217, 220 (1959). Congress and the President have plainly said that the Federal Government does not have the right to interfere or coerce Indian tribes when making decisions on whether to contract or not contract under the Self-Determination Act. Arizona's tax forces tribes into making Self-Determination Act contracts if it wants to maximize the miles of roads built.

The State's tax is pre-empted because of the comprehensive federal regulations of Self-Determination Act decisions and road construction contracts. Congress and the BIA regulate how money is budgeted to regions and Indian tribes, who sets priorities for road construction projects, the extent of federal and tribal involvement in planning, administration and construction, and whether Indian tribes can take over the projects. Federal law also governs when the BIA can take back the contract. Arizona, on the other hand, has no interest in reservation road construction activities other than taxing them.

ARGUMENT

I. *UNITED STATES v. NEW MEXICO* SHOULD NOT APPLY TO CONTRACTS FOR INDIAN RESERVATION ROADS.

The admonishment of Justice Frankfurter bears repeating in the instant case:

> The necessity for judicial accommodation between the intersecting interests of the States' power to tax and the concerns of the Nation in carrying on its government presents problems solutions for which cannot be sought by a formula assuring a bright, straight line of decisions.

City of Detroit v. Murray Corp., 355 U.S. 489, 496 (1958) (Frankfurter, J., concurring).[13] The State of Arizona and *amici* in support of petitioner fail to heed this advice, however, and blindly argue that *United States v. New Mexico*, 455 U.S. 720 (1982), applies because Blaze had a contract with the BIA. According to Arizona and its supporters, the rule set forth in *United States v. New Mexico* provides a "bright-line" rule to apply in all cases, including those involving construction projects on Indian reservations that are entered into ***after*** Indian tribes make several policy decisions.

United States v. New Mexico and its predecessors such as *James v. Dravco Contracting, Inc.*, 302 U.S. 134 (1937), are premised on the principle that the Supremacy Clause of the Constitution does not forbid state taxation of a Federal contractor in a typical government construction project. *See, e.g., United States v. New Mexico*, 455 U.S. at 733; *Graves v. New York*, 306 U.S. 466, 478 (1939). *United States v. New Mexico* would control here if this were a case in which Blaze just had a contract with the Federal Government for a typical construction project. It did not. Blaze Construction had a contract because six Indian tribes had previously made public policy decisions regarding road construction for the members of their tribes.

A. Indian Pre-Emption Analysis Applies to Taxes that Affect Tribal Decisions about Governmental Policy

The theoretical basis for Justice Frankfurter's concurring opinions in taxation cases was "our federalism." *United States v. New Mexico*, 455 U.S. at 731 (quoting *Graves*, 306 U.S. at 490 (Frankfurter, J., concurring)). Under our federal system, a state must avoid situations in which its taxes interfere with the operation of the federal government. *Graves*, 306 U.S. at 488 (Frankfurter, J., concurring). *Dravco Contracting* and *United States v. New Mexico* cases are judicial resolutions of the clash of federal and state sovereigns. *United States v. New Mexico*, 455 U.S. at 735 (citing *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316, 430

13. In *United States v. New Mexico*, this Court cited with approval Justice Frankfurter's concurring opinion. 455 U.S. at 735-36.

(1819), regarding clash of two sovereigns). The teaching of *United States v. New Mexico* is that when there is a two-sovereign dispute, the Supremacy Clause does not prohibit states from imposing taxes on a federal contractor. A contractor is only immune from taxation if Congress grants immunity. 455 U.S. at 737-38.

The important distinction between this case and *United States v. New Mexico* is the presence of policy decisions by a third sovereign, Indian tribes, which control decisions made by the United States. Indian tribes have a unique status under our Constitution. *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Indian tribes have inherent sovereignty. Pub. L. 103-413, 108 Stat. 4270-71.

This Court has also acknowledged that the presence of Indian tribes involves the interests of three, and not just two, sovereigns:

> The principle of Tribal self-government, grounded in notions of inherent sovereignty and in Congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government on the one hand, and those of the State, on the other.

Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 156 (1980).

This Court has recognized the analytical difference between federal and state conflicts under the Constitution, and those involving relations with Indian tribes. *Cotton Petroleum Corp. v. Bureau of Revenue*, 490 U.S. 163, 192 (1989). In addressing Cotton Petroleum's interstate commerce argument, the Court said that the Interstate Commerce Clause "is premised on a structural understanding of the unique role of the States in our constitutional system that is not readily imported to cases involving the Indian Commerce clause." *Ibid.* Interstate Commerce issues are like *United States v. New Mexico* cases because both involve a clash of federal and state authority under the Constitution. When a case involves the fundamental interests of Indian tribes to self-governance,

however, the dichotomy of federal versus state authority does not transfer because "the central function of the Indian Commerce Clause is to provide Congress with plenary authority to legislate in the field of Indian affairs. . ." *Ibid.*

The analytical approach advanced by Arizona and *amici* fails because it does not recognize the additional federalism and constitutional concerns that exist when Indian tribes are making political decisions. In fact, Arizona and *amici* completely avoid the tribal self-government issue or only pay it lip service. The Arizona Court of Appeals recognized the unique status and the political tensions involved when it concluded that *United States v. New Mexico* was not dispositive of this case. Pet. App. 9 (disagreeing with decision by New Mexico Supreme Court and stating the decision by the New Mexico court "overlooks the focus of Indian law pre-emption analysis on the occurrence of non-Indian activities on an Indian reservation and the consequent potential that state taxation of those activities will conflict with federal or tribal interests").

Rather than relying on precedents dealing with federal-state relations, it is more appropriate in this case to apply precedents in which the Court has addressed state taxes that affect the Federal Government's interactions with other sovereigns.[14] States have tried to impose non-discriminatory taxes on businesses involved in foreign commerce and this Court has invalidated those taxes because it infringes on the Federal Government's authority to engage in commerce with a sovereign nation. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979). The Court does not just "rubber stamp" the state tax because it is non-discriminatory

14. In *Cherokee Nation v. Georgia*, 5 Pet. (30 U.S.) 1, 16-19 (1831), the Court recognized that Indian tribes as separate sovereigns, but not "foreign states" under the Constitution. Congress, the constitutional institution with plenary power in this area, recognizes that Indian tribes are sovereign governments that it interacts with on a government-to-government basis. *See, e.g.*, Pub. L. 103-413 § 202(1), 108 Stat. at 4270-71 (Congressional finding that "the tribal right of self-governance flows from the inherent sovereignty of Indian tribes and nations").

and applies to a private party. The Court carefully examines six factors to determine if the tax offends the Federal Government's dealings with a third sovereign.[15] The factors from the Foreign Commerce Clause cases that are analogous to Indian pre-emption matters are whether the state taxes are fairly related to services provided by the state and whether the state tax impairs federal uniformity in an area in which federal uniformity is essential. *Barclays Bank*, 512 U.S. 320; *Container Corp.*, 463 U.S. at 186; *Japan Line*, 441 U.S. at 448. A state tax violates the "one voice" standard if it implicates a foreign policy issue that must be left to the Federal Government or violates a clear federal directive.[16]

15. In foreign commerce clause cases the Supreme Court uses the four factors from interstate commerce clause disputes, *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), and employs two additional criteria to determine whether the state tax is constitutional. The six factors are: (1) Does the activity taxed have a "substantial nexus" with the taxing state? (2) Is the tax fairly apportioned? (3) Does the tax discriminate against interstate commerce? (4) Is the tax "fairly related to the services provided by the State?" (5) Does the tax create an "enhanced risk of multiple taxation?" (6) Does the state tax impair federal uniformity in an area in which federal uniformity is essential? *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 446-47 (1979); *see also Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298, 316-17 (1994); *Container Corp. of Am. v. Franchise Tax Board*, 463 U.S. 159, 185-86 (1983); *Complete Auto Transit*, 430 U.S. at 279.

16. There also is a need to speak to Indian tribes with "one voice," particularly under the new transportation bill. The Navajo Reservation is located in Arizona, New Mexico and Utah. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 169 (1973). Under the new transportation bill, the Navajos will receive a set amount of money for its road construction needs. Pub. L. 105-178, § 1115(b)(4), 112 Stat. at 155. The Navajo leadership will have to determine how to allocate those resources in each state in which it is located. Further complicating this political task is the imposition of different levels of state taxes for construction projects. Ariz. Rev. Stat. Ann. § 42-1317(A)(1) (tax rate of 5%); N.M. Stat. Ann. § 7-9-4 (1998) (5% tax rate); Utah Code Ann. § 58-8-104(1) (1996) (gross receipts tax of 0% up to $10 million and .8613% from $10 million to $500 million). If the Navajo tribe enters into the contract itself, these taxes do not apply. If, however, tribe decides to allow the BIA to contract, it has to consider the application of varying rates of taxation, which complicates the sovereign decision on which roads within the reservation should be built, updated or repaired.

Container Corp., 463 U.S. at 194. Whether a state tax implicates foreign policy matters is a species of pre-emption analysis. *Ibid.*

The Court applies pre-emption analysis for foreign commerce challenges to state taxes. *Japan Line*, 441 U.S. at 446-47. Like foreign commerce matters, the Constitution grants to Congress the exclusive authority to regulate affairs with Indian tribes. Art. I, § 8, cl. 3; *Ramah Navajo School Bd. v. Department of Revenue*, 458 U.S. 832, 837 (1982) (Federal and tribal interests arise from the broad power of Congress to regulate tribal affairs under the Indian Commerce Clause). When a case involves a clash between the exercise of state authority and Indian sovereignty, the Court does not employ "mechanical or absolute" concepts. *Department of Taxation and Finance v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73, (1994). Instead, the Court utilizes the balancing approach set forth in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). *Milhelm, Attea*, 512 U.S. at 73; *see also Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995) (if legal incidence of tax falls on non-Indian for activities on reservation, Court "balance[s] . . . the federal, state and tribal interests" to see if state may impose its tax). There is no analytical reason to reject pre-emption analysis for state taxes that affect the government-to-government relationship between the Federal and tribal governments under the Indian Commerce Clause, and the decision-making process of Indian tribes about reservation infrastructure. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 149 n.14 (1980) ("For purposes of federal preemption, however, we see no basis, and respondents point to none, for distinguishing between roads maintained by the Tribe and roads maintained by the Bureau of Indian Affairs."); *cf. Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175-76 (1989) (discussing intergovernmental tax immunity, but then adding that the ultimate "question for us to decide is whether Congress has acted to grant the Tribe such immunity, either expressly or by plain implication"). The Court's multi-faceted test is required to resolve federal, tribal and state disputes in cases involving contractors. *See Ramah Navajo*, *supra*; *Japan Line*, *supra*.

B. *Ramah Navajo* Rejected Arizona's Analytical Approach for Cases Involving Tribal Sovereignty

The State's analytical framework has already been considered and rejected by the Court in *Ramah Navajo*. In that case, New Mexico argued that the "legal incidence" of its gross receipts tax was on the contractor and the case should be controlled by *Dravco*. *See* Brief of the State of New Mexico, *Ramah Navajo School Bd. v. Department of Revenue* at 13-14, 458 U.S. 832 (1982) (No. 80-2162). New Mexico also pointed out that the money for the project came from the Federal Government and would not hinder any value generated by the Tribe. *Ibid.* at 16-17. The Court rejected the simplistic "legal incidence" analysis in *Ramah Navajo* and should do so in this case as well.

The Court met head on New Mexico's legal incidence argument. 458 U.S. at 844 n.8. The Court said that the legal incidence test is significant in some situations such as *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), and *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976). *Ramah*, 458 U.S. at 844 n.8. Even though the legal incidence of New Mexico's tax was on a New Mexico contractor that did construction work other than that on Indian reservations, the Court refused to allow New Mexico to impose additional burdens on the significant Federal interest in fostering Indian-run educational facilities. *Ibid.*

The position of Arizona, *amici* States, and *amici* National Conference of State Legislatures, *et al.*, is, essentially the position of the dissent in *Ramah Navajo*. The dissent argued that since the legal incidence of the tax was on the contractor, it should be upheld. 458 U.S. at 856 (Rehnquist, J., dissenting) (quoting *United States v. New Mexico*, 455 U.S. at 738). The seven-person majority rejected this argument and applied implied pre-emption analysis. The "legal incidence" test is only crucial for determining the type of analysis to apply to a case. If the legal incidence of tax is on an Indian tribe or a member of the tribe, a state cannot enforce the tax "absent clear congressional authorization." *Chickasaw Nation*, 515

U.S. at 459. If the legal incidence is on a non-Indian, the Court balances the Federal, tribal and state interests. *Ibid.*

Moreover, Justices Rehnquist and Stevens noted in their dissent in *Ramah Navajo* that the "legal incidence" analysis from cases such as *United States v. New Mexico* is different if the issue involves the exercise of tribal sovereignty. Then Justice Rehnquist said,

> But apart from those rare instances in which the State attempts to interfere with the residual sovereignty of a tribe to govern its own members, the "tradition of tribal sovereignty" merely provides a 'backdrop' against which the pre-emptive effect of federal statutes or treaties must be assessed.

458 U.S. at 838 (Rehnquist, J., dissenting). This case involves one of those "rare instances" alluded to because a state tax has an effect on the sovereign authority that Indian tribes have over road construction projects within their boundaries.

C. Commercial Leasing Cases do not Apply to Cases Involving Tribal Sovereignty.

Arizona and *amici* National Conference of State Legislatures, et al., claim that this Court applies a categorical approach to taxation issues. Arizona and these *amici* rely on cases like *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980), and *Thomas v. Gay*, 169 U.S. 264 (1898), and assert that if there is a tax on a non-member of an Indian tribe, state taxation is permissible. Brief for Petitioner 11; Brief of National Conference of State Legislatures et al. 12-13. This line of cases involved taxation of commercial activities of non-members with an Indian tribe and not state taxation that affected governmental, policy decisions of an Indian tribe. *Colville, supra* (cigarette sales); *Montana Catholic Missions v. Missoula County*, 200 U.S. 118 (1906) (state taxes on missionaries for cattle grazed on reservation with consent of tribe); *Wagoner v. Evans*, 170 U.S. 588 (1898) (upholding taxation of cattle grazed on Indian reservation); *Thomas v. Gay*, 169 U.S. 264 (1898) (taxation of cattle of non-Indian lessee not invalid and

rejecting argument that taxation of cattle was taxation of the property of the tribe); *Maricopa & P. R.. Co. v. Territory of Arizona*, 156 U.S. 347 (1895) (upholding territorial taxation of railroad that ran through reservation); *Utah & Northern Ry. Co. v. Fisher*, 116 U.S. 28 (1885) (upholding state taxation of railroad that ran through reservation).[17] Thus, the *Thomas* line of cases stand for the proposition that states may tax the affairs of non-Indians "in cases in which essential tribal relations ***were not involved*** and where the rights of Indians would not be jeopardized. . . ." *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 171 (1973) (quoting *Williams v. Lee*, 358 U.S. 217, 219-20 (1959), and citing *Utah & Northern*) (emphasis added); *see also Strate v. A-1 Contractors*, 520 U.S. 438, 117 S. Ct. 1404, 1415-16 (1997) (citing *Thomas* for proposition that tax on non-member lessees too indirect to be tax on tribe, but recognizing that tribes have authority to protect right of self-government and to control their internal relations). *Thomas* does not apply here because Arizona's tax unlawfully infringes on the right of Indian tribes to make their own public policy decisions and it interferes with Federal and Tribal interests set forth in Federal law. *See, e.g., New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 & n.16 (1983).

---

17. The railroad cases are also distinguishable because the facts showed that the federal government granted the rights of way to the railroads. *Maricopa & P. R. Co.*, 156 U.S. at 351(no evidence of consent and, therefore "to be treated as if obtained without the Indians' consent"); *Utah & N. Ry. Co.*, 116 U.S. at 32 (authority to construct the railroad came from treaty between United States and tribe, which recognized that the United States had previously granted permission to construct railroad). The railroad line of cases are examples of cases in which Congress' plenary authority in this area withdrew certain elements of tribal sovereignty. *See South Dakota v. Yankton Sioux Tribe*, 118 S. Ct. 789, 798 (1998) (Congress plenary power over Indian tribes includes power to modify or eliminate tribal rights).

II. ARIZONA'S TAX SHOULD BE INVALIDATED BECAUSE TRIBAL ROAD CONSTRUCTION DECISIONS ARE FUNDAMENTAL CHOICES ABOUT SELF-GOVERNMENT.

The constitutional grant of authority to Congress

> and the "semi-independent position" of Indian tribes [has] given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations.

White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980); *see also New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 33333-34 & n.15; *Ramah Navajo*, 458 U.S. at 837. A state tax is invalid if it unlawfully infringes on the right of an Indian tribe to make its own laws and be governed by them. *Mescalero Apache Tribe*, 462 U.S. at 334 n.16; *Ramah Navajo*, 458 U.S. at 837; *Bracker*, 448 U.S. at 142; *Williams v. Lee*, 358 U.S. 217, 220 (1959). The constitutional principle set forth in *Bracker*, *Ramah Navajo*, and *Williams* is that tribal sovereignty includes the right to make public policy decisions that affect the members of an Indian tribe, as well as non-members who carry out those public policy decisions on Indian reservations. Arizona and *amici* States and National Conference of State Legislatures cite no constitutional or statutory authority that allows states to impose new variables into the decision-making process of Indian tribes. They cite no such authority because the founding fathers did not leave to states residual authority to impose legal requirements that affect the political decision by Indian tribes. *Williams*, 358 U.S. at 220 (question has always been whether state action infringes on the right of Indians to make their own laws and be ruled by them); *Rice v. Olson*, 324 U.S. 786, 789 (1945) (policy of leaving "Indians free from state jurisdiction and control is deeply rooted in the Nation's history").

A. Congress Foreclosed Governmental Impediments to Self-Determination Decisions

Congress has legislated in this area and said that only Indian tribes have the right to determine the extent of their participation in government contracts. Pub. L. 103-413, § 203(2), 108 Stat. at 4271. When Congress passed the Tribal Self-Governance Act of 1994, it was reacting to the protests by Indian tribes about restrictions on tribal self-governance. Tribal leaders complained to Congress and it enacted legislation, in part, because the BIA was substituting its views for those of Congress and Indian tribes. S. Rep. 103-374, 103d Cong., 2d Sess. at 3 (1994). The Senate found that the BIA regulations imposed more restrictive requirements, as well as new obstacles and burdens on tribal self-governance. *Ibid.* The House of Representatives found that the federal bureaucracy had eroded tribal self-government. H.R. Rep. 103-653, 103d Cong., 2d Sess. at 6 (1994). Congress responded, passed the Tribal Self-Governance Act of 1994, and prohibited government from placing impediments to tribal decisions on self-government.

It is clear from the legislative history that the policy of Congress is that the decision regarding whether an Indian tribe wants to enter into a contract is a decision that must be made freely by each tribe. Pub. L. 103-413, § 203(2), 108 Stat. at 4271. A tribal decision not to enter into a Self-Determination contract is an expression of the inherent sovereignty of a tribe. *Ibid.* §§ 202-03, 108 Stat. at 4270-71 (findings and declaration of policy). The Federal Government is not allowed to coerce the tribal decision-making process. *Ibid.* § 203(2), 108 Stat. at 4271. The BIA leaves to each tribe the initiative to make requests for contracts and acknowledges that the decision to not enter into a contract is an "equal expression of self-determination." 25 C.F.R. § 900.3(b)(5); *see also* Proclamation No. 5049, 48 Fed. Reg. 16,227 (1983) (Federal Government to eliminate excessive "government intervention" that has "stifled local decisionmaking").

When this Court interprets Federal statutes, such as the Self-Determination Act, it liberally construes statutes in favor of

establishing Indian rights. *See generally South Dakota v. Yankton Sioux Tribe*, 118 S. Ct. 789,798 (1998); Felix S. Cohen, *Handbook of Federal Indian Law* 224 (1982 ed) (citing *Bryan v. Itasca County*, 426 U.S. 373 (1976), and *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)). Conversely, the Court narrowly construes statutes when Indian rights are abrogated or limited. *Handbook of Federal Indian Law* 225. Since the issue is whether Arizona's tax limits the tribal right of self-determination, the Court should resolve all doubts in favor of free exercise of the right of self-determination. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *McClanahan*, 411 U.S. at 174; 25 C.F.R. § 900.3(a)(5) (regulations to be liberally construed).

When an Indian tribe exercises its right of self-determination, an assertion of state authority must be viewed against any interference with the assertion of that right. *Mescalero Apache Tribe*, 462 U.S. at 336 (when a tribe undertakes activity authorized by federal law, assertion of state authority must be viewed against interference with successful accomplishment of the federal purpose). Congress has not granted to states the right to affect tribal decisions regarding reservation infrastructure. *See* Pub. L. 103-413, § 203(2), 108 Stat. at 4271. Given Congress' broad statement to allow Indian tribes to "choose the extent of their participation" and its desire to eliminate governmental obstacles to free choice, the Court should conclude that the Self-Determination Act precludes states from imposing financial factors into the decision-making processes of Indian tribes. *See Mescalero Apache Tribe*, 462 U.S. at 340 (unlikely Congress would have authorized participation in tribal management if it were thought that a state was free to nullify the entire arrangement); *Bracker*, 448 U.S. at 142-43 (interference with right of self-government is an independent barrier to imposition of state taxes). If the Court allows Arizona's tax in this instance, it will nullify Congress' express finding that tribes be allowed to "choose the extent of participation" in Self-Determination Act contracts.

B. The Tax Affects Tribal Decisons under the Self-Determination Act

Arizona's tax will have a profound effect on the way in which Indian tribes will make Self-Determination decisions. Road construction is a central function of all levels of government. The Federal Government builds and maintains the interstate highway system, as well as roads in national parks and across federal land. States construct and maintain state highways. Counties and municipalities build roads.

Tribal governments also decide when, where, and how to build roads. *See* 23 U.S.C. § 204(j); 25 U.S.C. § 450a(b); 25 C.F.R. §§ 170.4a, 900.119. These decision are about the basic infrastructure on Indian reservations, which affect tribal economies. *Cf.* 137 Cong. Rec. E3566 (daily ed. Oct. 28, 1991) (statement of Rep. Miller that roads on reservations are part of safe and modern infrastructure). From 1986-90, the time period at issue in this case, Indian tribes prioritized the roads to be built, decided whether the roads should be paved or gravel, and whether to build the roads itself or allow the BIA to let the contract. *See, e.g.*, J.A. 35. Tribal decisions about road construction activities and tribal procurement procedures on reservations are classic examples of an Indian tribe making its own laws and being ruled by them. *Bracker*, 448 U.S. at 142.

Indian tribes will have to handle their own budgets in fiscal year 2000 under the recently enacted transportation statute. Pub. L. 105-178, § 1115(b)(4), 112 Stat. at 155. Indian tribes will have to prioritize road construction projects. Each tribe has to determine whether it has the resources and expertise to enter into a contract itself, or the resources to hire people who can provide it with the expertise necessary to enter into a Self-Determination Act contract. An Indian tribe also has to factor into the equation whether it truly needs to build, for example, $1 million of roads, or whether it can get by with $950,000 in roads ($1 million minus a 5% transaction privilege tax).[18] If a tribe needs all $1 million of roads, it will be forced to enter into Self-Determination contracts.

18. In its brief, the United States claims that there is no basis for the (Cont'd)

The record in this case shows how the taxes will affect governmental policy. Arizona has imposed $1.2 million in taxes on Blaze Construction. If these taxes are permitted, they will be included in future bids for road construction projects and will reduce the miles of roads built. J.A. 33. If $1.2 million is removed from the budget, the San Carlos road project could have been completely eliminated. *See* R.7, Exh. A at 26 (cost of road project $839,688.12). Alternatively, the Navajo Nation could have been forced to make decisions and eliminate certain aspects of the "Blue Gap" project. *Ibid.* at 26-27 (itemized costs of "Blue Gap" project). In the future, the Navajo government may have to choose whether it will forego paving access to the Chapter House or which cluster of Indian houses will not receive paved roads. Consequently, Arizona's tax is the equivalent of the "power to destroy" governmental decisions by this Nation's Indian tribes.

Indian tribes must also factor into their thought process the possibility that a contract will be returned to the BIA under reassumption or retrocission, and the effect that this will have on its members. 25 C.F.R. §§ 900.240-.241, 900.246-.247. If the project started out as a $1 million project to be performed by the

(Cont'd)
testimony of its BIA official, Eddie Ward. Brief of the United States 23 n.14. The Government's statement to this Court is disingenuous. Federal law required BIA officials to know about fiscal constraints and pass that information along to Indian tribes. 25 C.F.R. § 271.4(e) (1996) (duty to inform tribes of realities of funding). Mr. Ward's testimony simply proves that he knows how to carry out his statutory obligations and execute the Government's trust responsibilities. Mr. Ward's statements provide the Court with a description of how the Federal Government works with Indian tribes at the local level. His remarks are proof that local BIA officials know about budgetary constraints, that if a tax has to be paid by a contractor it is included in a bid submitted to the Government, and that tax has the net effect of reducing the miles of roads built. Moreover, if there was no basis for Mr. Ward's testimony, it was the obligation of counsel for the State of Arizona to either object or show on cross-examination that the testimony lacked foundation, which it did not. *See supra* n.3. On appeal, this Court cannot presume that there is no foundation for the testimony of Mr. Ward. If anyone knows how the Indian road construction statutes and regulations really work, it is a government official who interprets them every day.

Indian tribe, then no state transaction privilege taxes apply. Theoretically under its argument, Arizona could assert that it has the right to impose the tax in the event of retrocession or reassumption. Allowing states to tax a contract after retrocession or reassumption is unfair to expectations of Indian tribes and to contractors. Even though the BIA must provide the same level of funding for the project if it is returned, *ibid.* §§ 900.244, 900.256, there is no provision in the statutes or regulations for any additional funding to take into consideration the imposition of new state taxes after the formation of a construction contract. If the state taxed a contractor and the BIA allowed the new taxes to be factored into the cost of the project, it would mean that the Indian tribe would receive fewer miles of roads than it bargained for when it entered into the Self-Determination Act contract. If the tax were imposed on a contractor and the BIA did not allow the new tax to be included in the cost of the project, it would be unfair to the contractor because it entered into a contract in a situation in which there was no legal obligation to pay state transaction privilege (or gross receipts) taxes, but then would face new taxes if the contract is reassumed by or retroceded to the BIA.[19]

The Court should conclude that Arizona's tax is pre-empted because it infringes on the free exercise of the sovereign right of Indian tribes to self-governance.

III. THE STATE TAX FAILS BECAUSE IT IS PRE-EMPTED BY FEDERAL LAW.

This Court does not presume that the tax is either valid or invalid even though the legal incidence of Arizona's tax is on Blaze

19. States could take the position, for example, that they were entitled to levy taxes on any future payments to the contractor. Such a claim would then create disputes between the tribe because of its expectations on the scope of the contracts, the Federal Government's budgetary constraints and trust obligations, and the contractor. This hypothetical scenario shows the extent of federal regulation of road construction projects and the ways in which state taxes will interfere with the operation of federal and tribal policy. The Self-Determination Act regulations are further indicia of why state taxes are pre-empted by Federal law.

Construction. *See Chickasaw Nation*, 515 U.S. at 459. Arizona wrongly asserts that a state tax of a non-member of an Indian tribe is not pre-empted by Federal law unless there is a clear statement of Congressional intent. Brief for Petitioner 17. There is no requirement that Congress specifically prohibit taxation of Blaze. *Cotton Petroleum*, 490 U.S. at 176-77 ("federal pre-emption is not limited to cases in which Congress has expressly — as compared to impliedly — pre-empted the state activity"); *Mescalero Apache Tribe*, 462 U.S. at 334 (cases reject proposition that pre-emption requires express statement); *Bracker*, 448 U.S. at 144. Congressional intent is not the sole factor for determining whether state law is pre-empted. *Mescalero Apache Tribe*, 462 U.S. at 334. This Court must balance the tribal, federal and state interests to see if there is sufficient justification for the assertion of Arizona's tax to determine if it is pre-empted by federal law. *Mescalero Apache Tribe*, 462 U.S. at 334; *Ramah Navajo*, 458 U.S. at 838; *Bracker*, 448 U.S. at 143-44.

Cotton Petroleum did not change this Court's implied pre-emption analysis. The Court merely distinguished *Bracker* and *Ramah Navajo* because both Arizona and New Mexico did not assert any legitimate regulatory interest to justify its tax and there was comprehensive federal regulation of reservation roads, timber harvesting, and construction of schools. 490 U.S. at 184-85. The Court contrasted the previous two cases from the record before it, which showed that New Mexico regulated oil wells. *Ibid.* at 185-86. Consequently, the Court concluded that "[t]his is not a case in which the State has had nothing to do with the on-reservation activity, save tax it." *Ibid.* at 186. The continued vitality of *Bracker* and *Ramah Navajo*, is shown by the Court's consistent citation to these cases on the standard for implied pre-emption analysis. *See Milhelm Attea*, 512 U.S. at 73 (Justice Stevens writing for unanimous Court and citing *Bracker* as main authority and his decision in *Cotton Petroleum* as "see also" authority); *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 118 S. Ct. 1700, 1708 (1998) (Stevens, J., dissenting) (no citation to *Cotton Petroleum*, but calling for application of *Bracker* implied pre-emption analysis for sovereign immunity question).

Arizona also argues that federal regulations are not controlling for pre-emption analysis unless the purpose of the regulation "plainly supports policies to protect Indian tribes and their members from impermissible state taxes." Brief for Petitioner 27. This is not the law. This Court examined federal regulations in *Bracker* to determine whether Arizona's taxing scheme was pre-empted by federal law. 448 U.S. at 146-48, 151 n.15 (decision based on "pre-emptive effect of the comprehensive federal regulatory scheme"). Federal regulations must be liberally interpreted in favor of Indians. *See, e.g.*, 25 C.F.R. § 900.3(a)(5) (interpretation of Self-Determination Act regulations).

The balance of the Federal, tribal and state interests necessitates the conclusion that Arizona's tax is pre-empted by Federal law.

1. *Federal Interests*

Blaze Construction respectfully disagrees with the Solicitor General that there is no impingement on the interests of the Federal Government. Brief of United States 26. Arizona's tax interferes in a complex area of law and will affect how local BIA official, such as Eddie Ward, carry out the United States' trust responsibilities toward Indian tribes.

a. Comprehensive Regulatory Scheme

Congress has regulated by statute all aspects of road construction for Indian reservations. One significant aspect of Congressional regulation is to differentiate the manner in which reservation roads are prioritized and built. Rather than budgeting for a department or a specific project, starting in fiscal year 2000, Congress will appropriate money for each tribe based on a formula established by regulations. Pub. L. 105-178, § 1115(b)(4), 112 Stat. at 155. Once that money is allocated, each tribe becomes involved in the process of determining which roads will be built, who will be responsible for the contracts and, perhaps, for awarding the contracts. Each tribe works with the Secretary of the Interior for road projects. 23 U.S.C. § 204(e). The Federal Government cannot spend one dime for planning or construction without first

consulting with the affected tribe. 25 C.F.R. § 900.119. Indian tribes select the projects, which are then approved by the Secretary. 23 U.S.C. § 204(a); 25 C.F.R. § 170.4a. In contrast, the BIA only has the authority to "recommend" construction projects. 25 C.F.R. § 170.4a. These detailed road regulations are part of a comprehensive, Federal regulatory scheme. *Bracker*, 448 U.S. at 147-48 (discussing comprehensive nature of road regulations previously published at 25 C.F.R. Part 162).

Congress has also extensively regulated when and how Indian tribes are to enter into contracts under the Self-Determination Act. A tribal decision on whether to enter into a Self-Determination Act contract is not part of the typical procurement process. 25 C.F.R. § 900.115(a)-(b). It is a government-to-government agreement. Pub. L. 103-413, §§ 202-03, 108 Stat. at 4270-71. Nowhere in the statutes or regulations does the Federal Government allow states to participate in or influence an Indian tribe's decision on whether to enter into a Self-Determination Act contract, or at what stage of the construction process a tribe can intervene (e.g., planning or construction).[20]

---

20. Blaze Construction acknowledges that in *Cotton Petroleum* the Court said that the Self-Determination Act did not "express a congressional intent to pre-empt state taxation of oil and gas lessees." 490 U.S. at 183 n.14. *Cotton Petroleum* did not, however, involve self-determination for a truly governmental function — infrastructure on reservations that serves members of that Indian tribe. The record in *Cotton Petroleum* dealt with oil and gas leases with an Indian tribe, which are commercial activities.

Moreover, the *Cotton Petroleum* case was not a proper case for determining whether the Self-Determination Act had a pre-emptive effect on state taxes. The corporation primarily argued that the case was governed by the traditional commerce clause analysis. There was tension between the contractor and the Jicarilla Apache Tribe. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 435 n.233 (1993). The corporation asserted that the burden of state and tribal taxation impermissibly burdened interstate commerce and that the case was not a preemption case. *See Cotton Petroleum v. State*, 106 N.M. 517, 519, 745 P.2d 1170, 1172 (Ct. App. 1987). Given Cotton Petroleum's belief

(Cont'd)

The federal scheme for road construction and exercise of choice under the Self-Determination Act is so pervasive that Arizona's tax is precluded. *Bracker*, 448 U.S. at 148.

b. Effect on Trust Responsibilities

The United States' trust responsibilities originate from Chief Justice Marshall's decision in *Cherokee Nation v. Georgia*, 5 Pet. (30 U.S.) 1, 16 (1831), in which he described the relationship between the United States and Indian tribes as one that "resembles that of a ward to his guardian." The Government's trust responsibilities apply to the conduct of executive agencies. *Handbook of Federal Indian Law* 225. Executive agencies must adhere to "moral obligations of the highest responsibility and trust" and "the most exacting fiduciary standards," *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942), and are bound to

---

(Cont'd)

that the case was an interstate commerce issue, it had no incentive to develop a record on the interests of the Jicarilla Apache Tribe and did not develop a record on this point. The business claimed that the impact on the tribe was minimal and not a primary consideration. *Ibid.* at 519, 745 P.2d at 1172. Consequently, the district court found, and the corporation did not seriously disagree, that the taxes "did not impact the Tribe." *Ibid.* at 521, 745 P.2d at 1174. The Jicarilla Apache Tribe filed an *amicus* brief with the New Mexico Court of Appeals and argued that the case was governed by the pre-emption analysis employed by this Court in *Bracker* and *Ramah*. *Ibid.* at 519, 745 P.2d at 1172. New Mexico also considered the case governed by the preemption decisions of the Court. When the New Mexico Court of Appeals wrote its decision, it focused most of its attention and analysis on the corporation's commerce clause argument that the state taxes had to be proportional to the amount of benefits conferred. The lower court's preemption analysis was almost an afterthought and was included at the end of the opinion. *Ibid.* at 521-22, 745 P.2d at 1174-75 ("we feel constrained, in light of the Supreme Court's criticism in *Ramah*, 458 U.S. at 846 . . . , to discuss briefly the contentions made by the state and the Tribe"). When Cotton Petroleum filed its petition for a writ of certiorari, the Jicarilla Apache Tribe asked the Court to deny certiorari. *See* Brief of the Jicarilla Apache Tribe as Amicus Curiae in Opposition to Appellants at 3, *Cotton Petroleum Corp. v. Department of Revenue*, 490 U.S. 163 (1989) (No. 87-1327); *Frickey*, 107 Harv. L. Rev. at 435 n.233.

discharge their obligations "with good faith and fairness." *United States v. Payne*, 264 U.S. 446, 448 (1924); *Handbook of Federal Indian Law* 226. The ordinary standards of a private fiduciary apply to executive officials administering federal programs. *Morton v. Ruiz*, 415 U.S. 199, 236 (1974).

In carrying out these obligations and in complying with Federal law, the BIA officials who administer the road construction funds and interact with Indian tribes will be constrained by the impact of state taxes. For example, assume that Congress allocates $2 million in fiscal 2000 for road construction activities on the Navajo Reservation. The BIA officials know that if the Navajo tribe enters into a Self-Determination Act contract for road construction in Arizona, the $2 million budget will not be reduced by state taxes. *See generally* Arizona Transaction Privilege Tax Ruling 95-11 at 3, Ariz. St. Tax Rep. (CCH) ¶ 300-192. The BIA officials also know that if the BIA enters into the contract and the state tax applies, there will be 5% fewer miles of roads built. J.A. 33. As a trustor for the Indian tribes, the Federal Government is obligated to look out for the best interests of the tribes. To comply with this obligation, the BIA has an obligation to tell the Navajo Nation about the adverse fiscal consequences of a choice not to enter into a Self-Determination Act contract. *Cf.* 25 C.F.R. § 271.4(e) (1996) (required to inform tribes of "current realities of funding"). In fact, the BIA's regulations require the Federal Government to remove "any obstacles" that hinder tribal autonomy and flexibility for road construction projects 25 C.F.R. § 900.3(b)(1). Arizona's tax interferes with the Federal Government's participation in its government-to-government dealings with Indian tribes.

2. *Tribal Interests*

Each Indian tribe has an interest in maintaining its sovereignty and providing proper infrastructure to its members. The State's tax infringes on the tribal right of self determination and affects the number of miles of roads built or maintained by the BIA.

Indian tribes have significant contacts with road construction projects even if they do not contract directly with an entity like Blaze Construction. Rather it is the Federal Government that is constrained. The BIA cannot spend any money without consulting with a tribe and following tribal preferences to the extent possible. 25 C.F.R. § 900.119. Indian tribes participate in the planning, conduct and administration of federal programs. 25 U.S.C. § 450a(b). The BIA "recommends" projects, but the Indian tribes set the priorities. 25 C.F.R. § 170.4a. Even if the BIA contracts with an entity like Blaze, the BIA must keep Indian tribes of the ongoing status of construction projects. *Stewardship Plan* 29.

Some Indian tribes may not have the expertise or resources to manage their own contracts. A large tribe such as the Navajo Nation may have the skills to administer its own contract for road construction, but it may not have the expertise to handle the construction of a medical facility. Similarly, some smaller tribes in Arizona, such as the Havasupai in northern Arizona, may not have the financial resources of larger or wealthier tribes. Congress did not intend for smaller tribes, which often have the greatest needs, or tribes without expertise in an area, to suffer a 5% penalty if they do not enter into a Self-Determination Act contracts.

3. *State Interests*

The exercise of state authority that imposes additional burdens on an Indian tribe must be justified by functions or services performed by a state in connection with the on-reservation activity. *Mescalero Apache Tribe*, 462 U.S. at 336, 341-42; *Ramah Navajo*, 462 U.S. at 336. A state must point to more than its general interest in raising revenues. *Mescalero Apache Tribe*, 462 U.S. at 336; *Ramah Navajo*, 462 U.S. at 336. The Court has not retreated from the standard that a state's interest is strongest when there is some regulation of the on-reservation activity.[21] *See Hoopa Valley*

21. Arizona improperly claims that in *Cotton Petroleum* the Court abandoned any analysis of a State's on-reservation activities to justify taxation. In support of this proposition Arizona cites to page 189 of the Court's opinion. Brief for Petitioner 23 (quoting *Cotton Petroleum*, 490 U.S. at 189). On page

(Cont'd)

Tribe v. Nevins, 881 F.2d 657, 660 (CA9 1989) (discussing *Cotton Petroleum*, *Ramah Navajo*, and *Bracker*, and invalidating state tax because it because California played no role in the tribe's timber activities), *cert. denied*, 494 U.S. 1055 (1990); Pet. App. 21-24.

For example, in *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173 n.12 (1973), the Court unanimously rejected Arizona's contention that general services it provided to Indians were sufficient to support the State's right to impose an income tax. Arizona argued then, as it does now, that it was expending tax monies for the education and welfare within the Navajo reservation. *Ibid.*; *see also* Brief for Petitioner 6. The Court rejected this argument in *McClanahan*, pointing out that the Federal Government defrays 80% of Arizona's social security payments to reservation Indians under 25 U.S.C. § 639, and had authorized the expenditure of more than $88 million for rehabilitation programs for Navajos and Hopis living on the reservations. *Ibid.* The Court stated, " '[C]onferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their Tribal organization.' " *Ibid.* at 173 (quoting *The Kansas Indians*, 5 Wall. (72 U.S.) 737, 757 (1867)).

Similarly in *Ramah Navajo*, the Court rejected New Mexico's argument that services provided to the contractor off the reservation justified the imposition of its gross receipts tax. 458 U.S. at 843-45 & n. 10 (no evidence benefits related to school construction).

(Cont'd)

189, the Court addressed Cotton Petroleum's argument that the value of services provided by New Mexico exceeded the costs to the reservation, i.e., a *quid pro quo* argument. The Court discussed implied pre-emption analysis in section III and not section IV of the opinion. Arizona also misapplies *Cotton Petroleum* when it contends that even if state services are still relevant, Blaze Construction and the Arizona Court of Appeals improperly focused on direct services and not "intangibles." Brief for Petitioners 24. Again, Arizona is not relying on the portion of the opinion addressing pre-emption, but cites to a passage dealing with proportionality of taxes. Arizona's position is a classic example of quoting pronouncements of this Court out of context.

New Mexico argued that it spent $390,000 on the Navajo Reservation. New Mexico's Motion to Dismiss or Affirm at 6, *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982) (No. 80-2162). This Court found that such generalizations were an insufficient basis for the tax. 458 U.S. at 844. The Court has not overruled *McClanahan* or *Ramah*. The Arizona Court of Appeals correctly applied the precedents of this Court when weighing the state's interest and properly found that general money for state education or state highways is insufficient to outweigh the comprehensive federal regulations. Pet. App. 21-25.

In this case, Arizona does not regulate any aspect of road construction projects on Indian reservations. Arizona admits that it did not provide any services for the construction projects, took no responsibility for reservation roads after the reservation boundaries, provided no maintenance for the roads, and did not provide any employment services. J.A. 21, 38-40. The State of Arizona has no interest in the construction or maintenance of roads that almost exclusively serve members of Indian tribes. Arizona's only interest is in raising revenue. Arizona's interest is clearly outweighed and pre-empted by the extensive statutes and regulations governing the free exercise of tribal self-determination decisions and federal and tribal interests in road construction projects. *See Ramah Navajo*, 462 U.S. at 336.

III. THE COURT OF APPEALS DECISION DOES NOT FOSTER UNCERTAINTY.

For cases involving disputes between Federal, tribal and state authority, there is no bright-line rule. *See City of Detroit v. Murray Corp.*, 355 U.S. 489, 496 (1958) (Frankfurter, J., concurring). The touchstone in Federal, state and tribal matters is the Constitution and Congress' plenary authority to regulate intercourse with Indian tribes. *See, e.g., McClanahan*, 411 U.S. at 168-72. The application of the Indian Commerce Clause balancing test in this case is no different from the tests used by this Court to resolve cases under Interstate and Foreign Commerce Clauses.

When this Court analyzes state taxes that are challenged under each provision under Article I, § 8, cl. 3, it does not apply a bright-line test. Instead, the Court applies multi-pronged balancing tests. There is one common denominator in each test: Whether the State can show that the tax is related to services provided by it. *Bracker*, 448 U.S. at 143-44; *Japan Line*, 441 U.S. at 446-46 (foreign commerce); *Complete Auto Transit*, 430 U.S. at 279 (interstate commerce). The Foreign and Indian Commerce Clause tests also take into consideration whether the State tax impairs the Federal Government. *Bracker*, 448 U.S. at 143-44; *Japan Line*, 441 U.S. at 446-47.

To the extent that certainty is available in this area of law, the Court can only provide it in one of two ways. First, the Court could return to its analysis in *Worcester v. Georgia*, 6 Pet. (31 U.S.) 515 (1832), and the original intent of framers of the Constitution that states have no right to intervene in the internal affairs of Indian tribes.[22] The Court has repeatedly said that it will not return to this analysis. *E.g.*, *Ramah*, 458 U.S. at 845-46 (rejecting Solicitor General's argument that on-reservation activities are presumptively beyond the reach of the States).

The other option is to continue to employ the implied pre-emption test. The decision by the Arizona Court of Appeals fosters doctrinal certainty for Indian law. The court of appeals' decision keeps intact the implied pre-emption analysis for all taxing matters. Application of a multi-part balancing test for this case is consistent with the test that the Court applies to non-discriminatory taxes under the Interstate and Foreign Commerce Clauses. The decision by the Arizona Court of Appeals says that whenever a state tax affects issues of tribal self-determination, including road construction contracts, the federal and state courts must balance

22. *See, e.g.*, Joseph Story, *Commentaries on the Constitution of the United States* 380-82 (R. Rotunda & J. Nowak eds. 1987) ("The constitution has wisely disembarrassed the power of these two limitations; and has thus given to congress, as the only safe and proper depositary, the exclusive power, which belonged to the crown in the ante-revolutionary times; a power indispensable to the peace of the states, and to the just preservation of the rights and territory of the Indians.").

the federal, state and tribal interests. State government will know whether their taxing schemes are permissible, particularly if the government is not involved in any on-reservation regulation of the activity at issue.

Moreover, affirming the decision below allows this Court to explain the doctrinal distinction that it has maintained under its modern pre-emption analysis. There is a fundamental, doctrinal difference between a historically commercial enterprise such as a lease of an oil well or the sale of cigarettes, and a tax that affects tribal decisions about a basic function of government — whether to perform some activity for the health, safety and welfare of its citizens/members and whether to build roads for them. States neither expressly, nor impliedly through taxation, have the right to affect the public policy decisions of Indian tribes

Arizona's position does not provide doctrinal clarity. Instead, it turns the Constitution on its head. Two hundred years ago, the founding fathers presumed that states had no authority to regulate non-Indians inside the boundaries of an Indian reservation. *See, e.g., Worcester, supra*. Arizona now wants this Court to presume that states have the authority to tax or regulate those same non-Indians inside the boundaries of an Indian reservation. Arizona wants the Court to do away with the requirement that there be a relationship between taxation and governmental regulation on reservations for Indian Commerce Clause cases, even though states still must show a correlation between taxes and state regulation for interstate and foreign commerce matters. The Court should reject Arizona's attempt to overstep its bounds as it has done on many occasions in the past.

CONCLUSION

For the foregoing reasons, Respondent Blaze Construction Company, Inc. requests that the United States Supreme Court affirm the opinion by the Arizona Court of Appeals and remand this case to the Arizona Tax Court for an award of attorney's fees under Arizona law. Ariz. Rev. Stat. Ann. § 12-348(A)(1).

Respectfully submitted,

BRUCE C. SMITH
LAT J. CELMINS
Counsel of Record
MARGRAVE CELMINS, P.C.
Attorneys for Respondent
7201 East Camelback Road
Suite 330
Scottsdale, Arizona 85251
(602) 994-2000

APPENDIX

APPENDIX

APPENDIX A — RELEVANT STATUTES AND REGULATIONS INVOLVED

STATUTES

25 U.S.C. § 450a. Congressional declaration of policy

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

25 U.S.C. § 450h. Grants to tribal organizations or tribes

(a) Request by tribe for contract or grant by Secretary of the Interior for improving, etc., tribal governmental, contracting, and program planning activities

The Secretary of the Interior is authorized, upon the request of any Indian tribe (from funds appropriated for the benefit of Indians pursuant to section 13 of this title, and any Act subsequent thereto) to contract with or make a grant or grants to any tribal organization for —

Appendix A

(1) the strengthening or improvement of tribal government (including, but not limited to, the development, improvement, and administration of planning, financial management, or merit personnel systems; the improvement of tribally funded programs or activities; or the development, construction, improvement, maintenance, preservation, or operation of tribal facilities or resources);

TRIBAL SELF-GOVERNANCE ACT OF 1994
PUB. L. 103-413
108 Stat. 4250, 4270-71 (1994)

SEC. 201. SHORT TITLE.

This title may be cited "The Tribal Self-Governance Act of 1994".

SEC. 202. FINDINGS.

Congress finds that —

(1) The tribal right of self-governance flows from the inherent sovereignty of Indian tribes and nations;

(2) the United States recognizes a special government-to-government relationship with Indian tribes, including the right of the tribes to self-governance, as reflected in the Constitution, treaties, Federal Statutes, and the course of dealings of the United States with Indian tribes;

(3) although progress has been made, the Federal bureaucracy, with its centralized rules and

Appendix A

regulations, has eroded tribal self-governance and dominates tribal affairs;

* * *

SEC. 203. DECLARATION OF POLICY

It is the policy of this title to permanently establish and implement tribal self-governance —

(1) to enable the United States to maintain and improve its unique and continuing relationship with, and responsibility to, Indian tribes;

(2) to permit each Indian tribe to choose the extent of the participation of such tribe in self governance;

* * *

TRANSPORTATION EQUITY ACT FOR THE 21ST CENTURY
Pub. L. 105-178
112 Stat. 107, 155 (1998)

An Act to authorize funds for Federal-aid highways, highway safety programs, and transit programs, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * *

Appendix A

SEC. 1115. FEDERAL LANDS HIGHWAYS PROGRAM.

* * *

(b) ALLOCATIONS. — Section 202(d) of such title is amended —

* * *

(4) by adding at the end the following:

"(2) FISCAL YEAR 2000 AND THEREAFTER.—

"(A) IN GENERAL. — All funds authorized to be appropriated for Indian reservation roads shall be allocated among Indian tribes for fiscal year 2000 and each subsequent fiscal year in accordance with a formula established by the Secretary of the Interior under a negotiated rulemaking procedure under subchapter III of chapter 5 of title 5.

"(B) REGULATIONS. — Notwithstanding sections 563(a) and 565(a) of title 5, the Secretary of the Interior shall issue regulations governing the Indian reservation roads program, and establishing the funding formula for fiscal ***155** year 2000 and each subsequent fiscal year under this paragraph, in accordance with a negotiated rulemaking procedure under subchapter III of chapter 5 of title 5. The regulations shall be issued in final form not later than April 1, 1999, and shall take effect not later than October 1, 1999.

"(C) NEGOTIATED RULEMAKING COMMITTEE. — In establishing a negotiated rulemaking committee to carry out subparagraph (B), the Secretary of the Interior shall —

Appendix A

"(i) apply the procedures under subchapter III of chapter 5 of title 5 in a manner that reflects the unique government-to-government relationship between the Indian tribes and the United States; and

"(ii) ensure that the membership of the committee includes only representatives of the Federal Government and of geographically diverse small, medium, and large Indian tribes.

"(D) BASIS FOR FUNDING FORMULA.--The funding formula established for fiscal year 2000 and each subsequent fiscal year under this paragraph shall be based on factors that reflect —

"(i) the relative needs of the Indian tribes, and reservation or tribal communities, for transportation assistance; and

"(ii) the relative administrative capacities of, and challenges faced by, various Indian tribes, including the cost of road construction in each Bureau of Indian Affairs area, geographic isolation and difficulty in maintaining all-weather access to employment, commerce, health, safety, and educational resources.

"(3) CONTRACTS AND AGREEMENTS WITH INDIAN TRIBES. —

"(A) IN GENERAL. — Notwithstanding any other provision of law or any interagency agreement, program guideline, manual, or policy directive, all funds made available under this title for Indian reservation roads and for highway bridges located on Indian reservation roads to pay for the costs of programs, services, functions, and activities, or portions

thereof, that are specifically or functionally related to the cost of planning, research, engineering, and construction of any highway, road, bridge, parkway, or transit facility that provides access to or is located within the reservation or community of an Indian tribe shall be made available, upon request of the Indian tribal government, to the Indian tribal government for contracts and agreements for such planning, research, engineering, and construction in accordance with the Indian Self-Determination and Education Assistance Act.

FEDERAL REGULATIONS

ROAD CONSTRUCTION CONTRACTS

25 C.F.R. § 169.3 Consent of landowners to grants of right-of-way.

(a) No right-of-way shall be granted over and across any tribal land, nor shall any permission to survey be issued with respect to any such lands, without the prior written consent of the tribe.

25 C.F.R. § 170.5 Right-of-way.

(a) The procedure for obtaining permission to survey and for granting any necessary right-of-way are governed by part 169 of this chapter. Tribal consent as required under § 169.3(a) may be made by public dedication where proper tribal authority exists. Before any work is undertaken for the construction of road projects, the Commissioner shall obtain the written consent of the Indian landowners. Where an Indian has an interest in tribal land by virtue of a land use assignment, such consent shall be obtained from both the landholder of the assignment

and the Indian tribe. Right-of-way easements are to be on a form approved by the Commissioner.

CONTRACTS UNDER THE INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

25 C.F.R. § 900.3 Policy statements.

(a) Congressional policy.

* * *

(2) Congress has declared its commitment to the maintenance of the Federal government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal government, capable of administering quality programs and developing the economies of their respective communities.

* * *

(5) Congress has further declared that each provision of the Act and each provision of contracts entered into thereunder shall be liberally construed for the benefit of the tribes or tribal

organizations to transfer the funding and the related functions, services, activities, and programs (or portions thereof), that are otherwise contractible under the Act, including all related administrative functions, from the Federal government to the contractor.

* * *

(b) Secretarial policy.

* * *

(1) It is the policy of the Secretary to facilitate the efforts of Indian tribes and tribal organizations to plan, conduct and administer programs, functions, services and activities, or portions thereof, which the Departments are authorized to administer for the benefit of Indians because of their status as Indians. The Secretary shall make best efforts to remove any obstacles which might hinder Indian tribes and tribal organizations including obstacles that hinder tribal autonomy and flexibility in the administration of such programs.

* * *

(4) The Secretary recognizes that contracting under the Act is an exercise by Indian tribes of the government-to-government relationship between the United States and the Indian tribes. When an Indian tribe contracts, there is a transfer of the responsibility with the associated funding. The tribal contractor is accountable for managing the day-to-day operations of the contracted Federal programs, functions, services, and activities. The contracting tribe thereby accepts the responsibility

and accountability to the beneficiaries under the contract with respect to use of the funds and the satisfactory performance of the programs, functions, services and activities funded under the contract. The Secretary will continue to discharge the trust responsibilities to protect and conserve the trust resources of Indian tribes and the trust resources of individual Indians.

(5) The Secretary recognizes that tribal decisions to contract or not to contract are equal expressions of self-determination.

* * *

(7) The Secretary is committed to implementing and fully supporting the policy of Indian self-determination by recognizing and supporting the many positive and successful efforts and directions of tribal governments and extending the applicability of this policy to all operational components within the Department. By fully extending Indian self-determination contracting to all operational components within the Department having programs or portions of programs for the benefit of Indians under section 102(a)(1)(A) through (D) and for the benefit of Indians under section 102(a)(1)(E), it is the Secretary's intent to support and assist Indian tribes in the development of strong and stable tribal governments capable of administering quality programs that meet the tribally determined needs and directions of their respective communities. It is also the policy of the Secretary to have all other operational components within the Department work cooperatively with tribal governments on a government-to-government basis so as to expedite the transition away from Federal domination of Indian programs and make the ideals of Indian self-government and self-determination a reality.

Appendix A

25 C.F.R. § 900.115 How do self-determination construction contracts relate to ordinary Federal procurement contracts?

(a) A self-determination construction contract is a government-to-government agreement that transfers control of the construction project, including administrative functions, to the contracting Indian tribe or tribal organization to facilitate effective and meaningful participation by the Indian tribe or tribal organization in planning, conducting, and administering the construction project, and so that the construction project is responsive to the true needs of the Indian community. The Secretary's role in the conduct of a contracted construction project is limited to the Secretary's responsibilities set out in § 900.131.

* * *

(b) Self-determination construction contracts are not traditional "procurement" contracts.

25 C.F.R. § 900.119 To what extent shall the Secretary consult with affected Indian tribes before spending funds for any construction project?

Before spending any funds for a planning, design, construction, or renovation project, whether subject to a competitive application and ranking process or not, the Secretary shall consult with any Indian tribe or tribal organization(s) that would be significantly affected by the expenditure to determine and to follow tribal preferences to the greatest extent feasible concerning: size, location, type, and other characteristics of the project.

Appendix A

25 C.F.R. § 900.124 May the Indian tribe or tribal organization to use a grant in lieu of a contract?

Yes. A grant agreement or a cooperative agreement may be used in lieu of a contract under Sections 102 and 103 of the Act when agreed to by the Secretary and the Indian tribe or tribal organization. Under the grant concept, the grantee will assume full responsibility and accountability for design and construction performance within the funding limitations. The grantee will manage and administer the work with minimal involvement by the government. The grantee will be expected to have acceptable management systems for finance, procurement, and property.

25 C.F.R. § 900.240 What does retrocession mean?

A retrocession means the return to the Secretary of a contracted program, in whole or in part, for any reason, before the expiration of the term of the contract.

25 C.F.R. § 900.241 Who may retrocede a contract, in whole or in part?

An Indian tribe or tribal organization authorized by an Indian tribe may retrocede a contract.

25 C.F.R. § 900.244 Will an Indian tribe or tribal organization's retrocession adversely affect funding available for the retroceded program?

No. The Secretary shall provide not less than the same level of funding that would have been available if there had been no retrocession.

Appendix A

25 C.F.R. § 900.246 What does reassumption mean?

Reassumption means rescission, in whole or in part, of a contract and assuming or resuming control or operation of the contracted program by the Secretary without consent of the Indian tribe or tribal organization. There are two types or reassumption: emergency and non-emergency.

25 C.F.R. § 900.256 Will a reassumption adversely affect funding available for the reassumed program?

No. The Secretary shall provide at least the same level of funding that would have been provided if there had been no reassumption.